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BRIEF OF *AMICUS CURIAE* DOLLAR BANK, F.S.B. IN SUPPORT OF RESPONDENTS

INTEREST OF *AMICUS CURIAE**

Dollar Bank, F.S.B. ("Dollar") is a federally-chartered and federally-insured mutual savings bank, headquartered in Pittsburgh, Pennsylvania. Originally chartered in 1855 by the Commonwealth of Pennsylvania, Dollar converted to a federal charter in 1984. Through a network of forty-six branch offices, Dollar currently serves a deposit base in excess of two billion dollars.

Dollar agreed to acquire and operate a financially troubled thrift at the solicitation and with the active encouragement of the federal agencies then charged with regulating the thrift industry. In 1984, Dollar entered into an Assistance Agreement with the Federal Savings and Loan Insurance Corporation ("FSLIC"), which incorporated by reference a contemporaneous Resolution of the Federal Home Loan Bank Board ("FHLBB") approving Dollar's acquisition of Continental Federal Savings and Loan Association ("Continental"), a failing FSLIC-insured mutual savings and loan association. At the time of the acquisition, Continental's liabilities exceed its assets by approximately $230 million. The Assistance Agreement and Resolution, which together constitute the entire understanding between the parties, contain several

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* Letters reflecting written consent of the parties to the filing of this brief have been filed with the Clerk of the Court.

bargained-for commitments, including the FSLIC's and the FHLBB's promise that Dollar would have the right to amortize the value of the "supervisory goodwill"[1] resulting from the acquisition over a stipulated period on a straight-line basis, and to include the full amount of the unamortized supervisory goodwill in the calculation of regulatory capital for *all* purposes. The "Accounting Principles" section of the Assistance Agreement, which memorializes that understanding, provides that Dollar may make use of supervisory goodwill in the manner prescribed by the incorporated Resolution even if later changes in FHLBB regulations totally proscribe or in any way limit a thrift's ability to use supervisory goodwill for regulatory capital purposes. This same provision appears in the contracts of various thrifts, such as, for example, in the Statesman contract.

Dollar has fully performed its contractual obligations, and the FHLBB and the FSLIC -- as well as the Office of Thrift Supervision ("OTS") and the Federal Deposit Insurance Corporation ("FDIC"), as their statutory successors in interest -- have received the full benefit of the contractual bargain, including avoiding the considerable

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[1]For decades under generally accepted accounting principles ("GAAP") goodwill -- the difference between the aggregate value of the individual assets of the entity purchased and the price the buyer paid -- has been recognized in purchase method accounting as a separate asset, *see* Accounting Principles Board Opinions 16 (Aug. 1970), and so was and is included in GAAP capital. The goodwill so produced that can be included in capital is reduced each year pursuant to a multi-year amortization schedule. Supervisory goodwill is a recent term of art referring to goodwill, both GAAP and the sometimes more generous "regulatory" type, arising from acquisitions of failing thrifts classified as "supervisory" cases.

expense of liquidating Continental and paying off its insured depositors.

Nevertheless, the OTS and the FDIC have refused to honor the contractual promises made to Dollar regarding the use of supervisory goodwill. As in the cases before the Court, the current federal thrift regulators have taken the position in their dealings with Dollar that any contractual promises regarding the accounting for regulatory capital have been abrogated and superseded by the regulatory standards mandated by the Financial Institutions, Reform, Recovery and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, 103 Stat. 83 (1989). While Dollar has satisfied all of FIRREA's capital requirements without including supervisory goodwill as permitted by its Assistance Agreement, it has accomplished that only at considerable sacrifice to its asset base.

Dollar, like respondents, believes that it is entitled to damages as a result of the government's failure to perform its contractual obligations. Accordingly, on June 27, 1995, Dollar brought suit in the United States Court of Federal Claims, alleging breach-of-contract and Fifth Amendment Takings Clause claims against the United States. Dollar's case has been stayed pending decision by this Court in these cases. As a result, Dollar's right to obtain the relief in its case undoubtedly will be directly affected by this Court's disposition of the present cases.

STATEMENT OF THE CASE

The savings and loan crisis of the 1980s and the reaction of the federal thrift regulators is by now a familiar tale. The thrift industry sustained billions of dollars in operating losses during the 1980s because of a substantial "negative spread" between the costs of funds and the return

on the thrifts' low, fixed-rate mortgage portfolios.[2] As the number of failing thrifts increased, the FSLIC deposit insurance fund, in turn, was being rapidly depleted.[3] The federal government was faced with either liquidating failing thrifts and paying off depositors, or supporting supervisory mergers and/or acquisitions by healthy thrifts with substantial cash contributions. Either alternative carried the serious prospect of bankrupting the FSLIC deposit insurance fund. *See Olympic Fed. Sav. & Loan Ass'n* v. *Director, OTS*, 732 F. Supp. 1183, 1185 (D.D.C. 1990).

As a way out of this dilemma, the FHLBB and the FSLIC mounted an aggressive program to induce healthy financial institutions or investors, such as Dollar, to acquire failing thrifts. To avoid depleting the FSLIC insurance fund, the federal thrift regulators began to negotiate and arrange supervisory mergers and acquisitions that included non-cash assistance, including, in particular, rights to the use of supervisory goodwill as a depreciating asset in calculating regulatory capital. *Id.*; *see also* Federal Home

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[2]*See, e.g.*, Federal Home Loan Bank Board 1984 Annual Report at 6 (1985) ("During both the last half of 1981 and the first half of 1982, more than 80% of all FSLIC-insured associations lost money."); *Troubled Financial Institutions: Solutions to the Thrift Industry Problem* (GAO/GGD-89-47, Feb. 21, 1989) at 107 (the number of FSLIC-insured institutions reporting negative GAAP net worth rose from twenty-one in June 1981 to 500 in March 1988); *id.* at 110 (thrift industry net losses in 1987 and 1988 were $6.8 billion and $13 billion, respectively).

[3]*See, e.g., Troubled Financial Institutions, supra* note 2, at 108 (FSLIC's total reserves declined from $6.46 billion in 1980 to $4.55 billion in 1985, when the FHLBB estimated $15.8 billion was needed to close all GAAP-insolvent institutions).

Loan Bank Board 1981 Annual Report. In this regard, former FHLBB Chairman Richard T. Pratt explained that:

> The Bank Board was caught between a rock and a hard place. . . . While it did not have sufficient resources to close all insolvent institutions, at the same time, it had to consolidate the industry, move weaker institutions into stronger hands, and do everything possible to minimize losses during the transition period. Goodwill was an indispensable tool in performing this task. . . .

Pet. App. 7a (quoting Mr. Pratt).

Use of supervisory goodwill significantly benefited the government by allowing "the loss to the [FSLIC] insurance fund [to be] shifted to the acquiring institutions." H.R. Rep. No. 54, 101st Cong., 1st Sess., pt. 1 at 498 (remarks of Reps. Annunzio, Kanjorski and Flake), *reprinted in* 1989 U.S.C.C.A.N. 87, 293.[4] Indeed, without supervisory goodwill, many transactions would have been irresponsible -- if not, impossible -- because the capital deficit of the troubled thrift would have put the acquiring institution hopelessly out of compliance with then-applicable regulatory standards. *See, e.g.*, Pet. App. 22a.

Because supervisory goodwill was often vital to the financial viability of the transaction over the long-term, and

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[4]*See also Housing and Urban-Rural Recovery Act of 1982: Hearings Before the Subcomm. on Housing and Community Development of the House Comm. on Banking. Finance and Urban Affairs*, 97th Cong., 2d Sess. 1502 (1982) (Statement of Richard T. Pratt) (supervisory goodwill contracts "conserv[ed] the FSLIC's insurance fund" by "spread[ing] as much of the industry's . . . trouble spots" as possible throughout healthy thrifts).

because acquirors were undoubtedly concerned about the possibility of subsequent regulatory changes that could undermine the economic basis of the transaction, many acquirors, like Dollar, insisted upon, bargained for, and obtained from the federal thrift regulators unqualified contractual commitments regarding the use to which they could put supervisory goodwill.

After the enactment of FIRREA, however, the OTS and the FDIC dishonored the contractual commitments made by their statutory predecessors, claiming that FIRREA abrogated all prior agreements that were inconsistent with the statute's new capital standards. Many of the thrifts aggrieved by the federal government's repudiation of its supervisory goodwill commitments sued, seeking either to hold the government to its binding promises, or, as is true in the instant cases, for damages or other make-whole relief.

The cases before the Court originated in the United States Court of Federal Claims, which held that respondents had contracts with the United States that were breached as a result of the federal thrift regulators' application of the FIRREA regulatory capital standards to respondents' thrifts. The trial court certified its liability determination for interlocutory appeal. A divided panel of the United States Court of Appeals for the Federal Circuit reversed the trial court. Upon respondents' petitions, the en banc Federal Circuit vacated the panel's decision and accepted the cases for review by the entire Court. After renewed briefing and reargument, the en banc Court affirmed the trial court's liability ruling.

SUMMARY OF ARGUMENT

The United States challenges the en banc decision of the Federal Circuit on three broad grounds. To begin with, the government contends that because the contracts at issue purport to restrict its authority to regulate, the court below failed to apply the so-called "unmistakability doctrine," to determine whether the contracts "surrendered" that authority in "unmistakable" terms, which it also maintains none of respondents' contracts do. Next, the United States asserts that even if these contracts unmistakably set forth the supervisory goodwill promises that respondents claim were made, the federal thrift regulators lacked authority to bind future Congresses and, thus, any commitment that the rules regarding calculating regulatory capital would not be changed was "*ultra vires* and invalid." Last, if all else fails, and the supervisory goodwill promises were, in fact, set out in unmistakable terms and the thrift regulators had the statutory authority to make those promises, the United States maintains that it is excused by the sovereign acts doctrine from paying contract damages.

In other words, the United States' position is effectively that the thrift regulators never made such promises; if they made those promises, they could not have meant what they said; and even if the thrift regulators made those promises and meant what they said, none of that counts. The predictable upshot of this paralogism is that the government not only is free to walk away from its commitments without compensating respondents for the losses sustained, but it can also retain the full benefits derived from having induced respondents and many others, like Dollar, to "bailout" the FSLIC insurance fund.

Dollar believes that the government's position on all three fronts is not well taken. In particular, Dollar agrees

with the Federal Circuit that the "unmistakability doctrine" is inapplicable in these circumstances, and that the sovereign acts doctrine does not bar respondents from recovering breach of contract damages due to the government's failure to honor its supervisory goodwill agreements. For the most part, Dollar will leave those issues to respondents. This amicus brief will, instead, focus on: (1) whether the FHLBB and the FSLIC had statutory authority to enter into contracts vesting in acquiring thrifts rights regarding the use of supervisory goodwill, and (2) whether the agreements at issue here did, in fact, establish such vested rights, the abrogation of which allows respondents to recover damages or other appropriate relief. The answer to both questions is a resounding yes.

There is little question but that the enabling statutes of the FHLBB and the FSLIC gave those agencies the authority to enter into binding contacts regarding the use of supervisory goodwill. The thrift agencies acted on that statutory authority to enter into contracts with respondents and other acquiring thrifts like Dollar. Congress plainly knew and approved the exercise of that authority.

Further, the language of the contracts at issue in this case (including the Statesman Assistance Agreement, which is very similar to Dollar's contract) establishes that respondents, like Dollar, were "unmistakably" given vested contract rights that the government is not free to override without any cost. Contrary to what the United States argues, the contractual language expressly states that its provisions control in the case of subsequent regulatory change, leaving unassailable the conclusion that it was not the acquiring thrifts but the government that assumed the risk of a subsequent regulatory change.

Try as it might, the United States is unable to articulate any convincing reason why thrifts would agree to relieve

the FSLIC insurance fund of substantial liability without also obtaining a binding reciprocal promise from the federal thrift regulators, creating a vested interest in using supervisory goodwill in the manner prescribed in the agreement. While there undeniably were potential benefits to the acquiring thrifts, none of those benefits could reasonably be achieved if the acquiring thrifts were deprived of the economic basis of the bargain -- the use of supervisory goodwill in calculating regulatory capital for the full prescribed period. Nor has the government effectively explained why it would be fair or just to construe the contracts at issue to deny respondents relief and permit the government both to retain the benefit of the bargain it struck and to be excused from meeting its unambiguous reciprocal obligations.

ARGUMENT

The music accompanying the words of each of the government's various arguments sounds the same false note: that in order to affirm the decision below, the Court must agree that the contracts at issue relieved respondents of the burden of complying with the law. According to the United States, the Federal Circuit in these cases held that "the contracts either committed Congress not to enact new legislation requiring a different treatment of respondents' capital or granted respondents a prospective immunity from any such legislative change." Pet. Br. at 36. Having so characterized the contracts at issue, the United States easily moves to the conclusion that such contracts are invalid because no federal agency may "enter into an agreement that binds future Congresses not to change regulatory schemes or that immunizes private parties from the effects of such changes." *Id.*

As it has throughout this litigation, the United States has simply mischaracterize the relevant issue. The question is

not whether, as the United States misphrases it, the federal thrift regulators could bind Congress or immunize the acquiring thrifts from the effects of subsequent legislation. Since the ability of Congress to legislate cannot be constrained except by some constitutional limitation, no Congress could authorize federal agencies to enter into contracts that limited the ability of a future Congress to enact legislation, or that immunized the parties from the prospective effect of such legislation.[5] That is a strawman that the government first builds and then knocks down because confronting the real issue in the case does not produce favorable answers.

No one claims that the contracts in dispute had the effect the government describes. Rather, the claim is that in return for assuming the losses of the acquired thrifts, thereby relieving the FSLIC fund of that responsibility, the federal thrift regulators made them specific, unqualified promises regarding the use of supervisory goodwill. To make that promised use of supervisory goodwill meaningful, the thrift regulators agreed that the government would be liable for breach of contract if it failed to honor those promises for whatever reason, including subsequent legislation. In other words, the government assumed the risk that subsequent legislation would render impossible performance of its supervisory goodwill commitments.

Consequently, the core issues in these cases are (1) whether the federal thrift regulators had statutory authority

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[5] Such contracts may, however, create vested rights that Congress could not retroactively abrogate on due process grounds, *see Landgraf* v. *USI Film Products*, 114 S. Ct 1483, 1497 (1994), and which Congress could not nullify prospectively except for a "public use" and then only upon payment of "just compensation" pursuant to the Takings Clause. *Id.*

to enter into contracts establishing vested rights, the abrogation of which by later legislation gives rise to a claim for damages, and (2) whether the thrift regulators did so in the cases before the Court. The answers to those questions, which Dollar addresses in turn below, do not favor the government.

I. FEDERAL THRIFT REGULATORS HAD BROAD STATUTORY AUTHORITY TO ENTER INTO BINDING CONTRACTS REGARDING THE USE OF SUPERVISORY GOODWILL TO CALCULATE REGULATORY CAPITAL

Agencies of the federal government have broad discretionary authority in carrying out their functions, including the authority to contract when the agency determines that it is in its program interests to do so. *See American Fed. of Gov't Employees, Local 2017 v. Brown*, 680 F.2d 722 (11th Cir. 1992), *cert. denied*, 459 U.S. 1104 (1983); *Local 2855, AFGE (AFL-CIO) v. United States*, 602 F.2d 574 (3d Cir. 1979). And it has long been recognized that the federal government has the power to enter into contracts that confer vested rights on private parties. *See, e. g., Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41, 52 (1986) ("*POSSE*") ("the Federal Government, as sovereign, has the power to enter contracts that confer vested rights, and the concomitant duty to honor those rights"); *Perry* v. *United States*, 294 U.S. 330, 350-59 (1935); *Lynch* v. *United States*, 292 U.S. 571, 579 (1934). Government contracts are customarily entered into between federal agencies and private parties, not only for the provision of goods and services to the government, but also (as in the

case of the thrift agreements here) to achieve regulatory goals of Congress.[6]

Federal agencies "normally have the discretion to decide whether to accomplish their objectives by contract or through the use of Government employees." 1 Ralph C. Nash, Jr. & John Cibinic, Jr., *Federal Procurement Law* 5 (3d ed. 1977). The federal thrift regulators were not treated different from other agencies in this regard. Since its inception, the FSLIC had the "power . . . [t]o make contracts." 12 U.S.C. § 1725(c)(3) (1988) (repealed). This authority to contract was at least coextensive with the express statutory delegations of authority that the FSLIC, and the FHLBB, as its operating head, 12 U.S.C. § 1725(a) (1988) (repealed), could use to carry out their oversight of the thrift industry. As particularly relevant here, the federal thrift regulators had the authority to extend "assistance" to acquirors of insolvent FSLIC-insured institutions, 12 U.S.C. § 1729(f)(2)(A) (1988) (repealed), and relatedly, the authority to set minimum capital levels on a case-by-case basis, 12 U.S.C. § 1730(t) (1988) (repealed). Taken together, the power to grant broad assistance in connection with acquisitions and the authority

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[6]*See, e.g.*, 7 U.S.C. § 608(2) (Secretary of Agriculture empowered in carrying out, through contractual arrangements, Congressional policy of maintaining orderly marketing conditions of agricultural commodities); 16 U.S.C. § 590a (similar authority in carrying out policy of preventing soil erosion); 25 U.S.C. § 450f (Secretary of Interior authorized and directed to enter into "self-determination" contracts with Native American tribes pursuant to the Indian Self-Determination and Education Assistance Act); 18 U.S.C. § 3621(b) (allowing Bureau of Prison officials to contract with private persons for incarcerating federal prisoners).

to set capital levels on a case-by-case basis provided the federal thrift regulators with the necessary authority to enter into binding contracts addressing regulatory capital issues, including the use of supervisory goodwill in calculating regulatory capital.[7]

The United States argues that those statutes are inadequate to the task because they did not expressly authorize the FHLBB and the FSLIC to enter into agreements regarding supervisory goodwill. Pet. Br. at 41. The government has, however, not always been so insistent upon explicit statutory language authorizing an agency to contract with private persons, even with regard to matters touching upon so-called "core" government activities. In an opinion rejecting the Comptroller General's challenge to the practice of the Federal Bureau of Prisons to place federal prisoners in private prisons under various contracts with the owners of such facilities, the Acting Assistant Attorney General, Office of Legal Counsel, Department of Justice, declared that "the power of an agency to contract for services is not dependent on specific authority to enter into such contract." 16 U.S. Op. Off. Legal Counsel 75,

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[7]As the Acting Comptroller General concluded:

> In making the agreements, FSLIC acted under broad statutory authority to set the terms and conditions of the assistance it would give to the acquirers of troubled thrifts. Any attempt by the government to cancel the agreements . . . could amount to a breach of contract and also could be challenged as an unconstitutional taking of property without just compensation.

August 27, 1990 Letter From Milton J. Socolar, Acting Comptroller General of the United States to Senator Terry Stanford, Committee on Banking, Housing and Urban Affairs, and enclosed Memorandum (GAO Doc. No. B-240860).

87 (1992). The Office of Legal Counsel explained that "[t]he authority of the executive to use contracts in carrying out authorized programs is. . . generally assumed in absence of express statutory prohibitions or limitations." *Id*. at 86, quoting 1 Nash & Cibinic, *supra*, at 5, 10.

As evidenced by the fact that they undertook to resolve, at least in part, the thrift industry crisis through contracts, the federal thrift regulators were certainly of the view that their organic statutes certainly did not prohibit and, in fact, invested them with sufficient authority to enter into binding agreements in which the use of supervisory goodwill for regulatory capital purposes was a bargained-for provision. The federal thrift regulators understood that "assistance in a merger or acquisition" was authorized by 12 U.S.C. § 1729(f) (1988) (repealed), "'within the sole discretion' of the FSLIC," and upon "'such terms and conditions' as it may prescribe." According to the FHLBB, the "maximum flexibility" afforded by the statute "must be retained in this area in order to enable the FSLIC to take all steps that may be necessary to prevent the failure of insured institutions that involve the least cost to the insurance fund." 52 Fed. Reg. 39065 (Oct. 20, 1987).

Relying upon that very statutory authority, the federal regulators aggressively implemented a contract-based program expressly sanctioning the use of supervisory goodwill in calculating regulatory capital in order to make acquisitions of failing thrifts economically feasible to the acquiring institutions. The various cases filed by acquiring thrifts seeking to enforce the pre-FIRREA regulatory capital promises made by the FHLBB and the FSLIC illustrate that such contractual understandings were not isolated or aberrational instances, but a major component of

a regulatory effort that employed such promises to promote assisted acquisitions of failed thrifts.[8]

The actions of the thrift regulators, charged with administering these statutory provisions, speak loudly as to the breadth of those provisions. *See, e.g., Chevron, U.S.A.. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-43 (1984). The contemporaneous actions and statements of the FSLIC and FHLBB are plainly far more persuasive as to whether these now-repealed statutes delegated to those agencies authority to enter binding contracts than the contrary litigation-based interpretation now offered by the government. *See Lawrence* v. *Chater*, No. 94-9323, slip op. at 11-12 (U.S. Jan. 8, 1996) (acknowledging "concern that postlitigation interpretations [of a statute by the Government] may be the product of unfair or manipulative Government litigating strategies, and we therefore view late changes of position by the Government with some skepticism"); *Bowen* v. *Georgetown University Hosp.*, 488 U.S. 204, 212 (1988) (deference to agency interpretation not applicable to agency litigation positions that are unsupported by regulations, rulings, or administrative practice).[9]

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[8] In its certiorari petition (Pet. at 13), the United States reported that over 90 cases raising similar supervisory goodwill claims are currently pending in the Court of Federal Claims.

[9] The notion that the FSLIC and FHLBB lacked authority to enter into binding contractual commitments regarding the use of supervisory goodwill for regulatory capital purposes is also a litigation position of fairly recent vintage. In *Carteret Savings Bank, F.A.* v. *Office of Thrift Supervision*, 963 F.2d 567 (3d Cir. 1992), Dollar Bank, as amicus in that case, argued that the FHLBB and FSLIC had the authority to enter into binding contracts that would confer vested rights regarding supervisory goodwill. In its reply brief, the government acknowledged "That may be true. . .,"

Moreover, Congress was well aware that the federal thrift regulators had used their statutory authority to implement a regulatory regime to assist acquirors of failing thrifts by entering into various arrangements regarding the regulatory capital treatment of supervisory goodwill. Congress did not upset that regulatory approach and, in fact, expressly sanctioned its use.

In 1987, a year when the thrift industry was losing nearly $7 billion and the FSLIC insurance fund had a deficit of over $6 billion, Congress passed the Competitive Equality Banking Act of 1987 ("CEBA"), Pub. L. No. 100-86, 101 Stat. 552 (1987). Among other things, CEBA required the FSLIC to prescribe uniformly applicable GAAP accounting standards to be used by all insured institutions for regulatory purposes. CEBA § 307,12 U.S.C. § 1730h(b) (1988) (repealed). However, in explicit recognition of existing arrangements regarding supervisory goodwill, CEBA itself provided that the uniformity

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and was content with pointing out that Dollar had failed to identify some statutory "provision establishing that Congress had delegated [the thrift regulators] the power to prohibit the legislature from altering the regulatory scheme to meet radically changed circumstances." Reply Brief for the Appellants at 21, *Carteret Savings Bank, F.A.* v. *Office of Thrift Supervision*, *supra*. As discussed earlier, however, since one Congress could not itself bind another Congress, the absence of some provision authorizing the FHLBB or FSLIC to do so is meaningless. The key question is whether those agencies had the authority to create binding contracts in which the agencies agreed that, if subsequent legislation prevented performance of their contractual promises, the government would be liable for any resulting damages. On that point, however, the government had no quarrel with Dollar's description of the thrift regulators' authority under the then-applicable statutes.

requirement "shall not affect the authority of the [FSLIC] to authorize insured institutions to utilize subordinated debt and goodwill in meeting reserve and other regulatory requirements." CEBA § 307, 12 U.S.C. § 1730h(d) (1988) (repealed). The Senate Report makes clear that "[n]othing in this section is intended to eliminate the flexibility of the Bank Board and of the FSLIC in determining the includibility of subordinated debt instruments as regulatory capital or to require the deduction of goodwill." S. Rep. No. 19, 100th Cong., 1st Sess., at 20, *reprinted in* 1987 U.S.C.C.A.N. 489, 510.

In short, what Congress said in 1987 about the scope of the federal thrift regulators' authority cannot be ignored, even though the government has conveniently failed to acknowledge its existence, let alone its significance. *See Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-81 (1969); *accord Lorillard, Inc.* v. *Pons*, 434 U.S. 575, 580-82 (1978). Not only was Congress aware of how the federal thrift regulators had been using supervisory goodwill for accounting and regulatory accounting purposes, but in CEBA Congress expressly validated the authority of federal thrift regulators to enter into such arrangements and encouraged the continued use of supervisory goodwill as a means to deal with failing thrifts without depleting the FSLIC's deposit insurance fund.

II. THE CONTRACTS "UNMISTAKABLY" GIVE RESPONDENTS VESTED RIGHTS, THE ABROGATION OF WHICH ENTITLES THEM TO RECOVER DAMAGES

Perhaps recognizing that its lack of statutory authority argument is less than fully convincing in light of the plain language of the then-governing statutes, undeniable administrative practice and Congress' endorsement of the practice, the United States relegates that otherwise

threshold argument to second place in its brief. Instead, the government leads with the argument that the FHLBB and FSLIC made no binding commitments to respondents that created vested rights in the use of supervisory goodwill for regulatory capital purposes. As the government sees it, in order for those agencies to have made contractual commitments regarding respondents' use of supervisory goodwill, those commitments had to "be expressed clearly and unmistakably in the language of the contractual documents." Pet. Br. at 11. Relying upon the so-called "unmistakability doctrine," articulated by this Court in *Bowen* v. *Public Agencies Opposed to Social Security Entrapment*, 477 U.S. 41 (1986), the United States asserts that it did not make any contractual "commitments . . . to continue to permit goodwill to be counted as capital." Pet. Br. at 12. According to the United States, what respondents consider to be contracts were merely "directives as to what respondents must do to comply with current regulatory policy." *Id.*

Dollar submits that the courts below correctly concluded that the unmistakability doctrine has no application where, as here, the remedy sought is damages for breach of contract. But even accepting the government's premise that the unmistakability doctrine applies here, it does not follow that respondents are not entitled to relief. As is demonstrated by the Statesman contract (which, of the three contracts at issue, most closely resembles Dollar's contract), thrift acquirors received contractual commitments in unmistakable terms guaranteeing for a specific period of time the use of supervisory goodwill in calculating regulatory capital. That such promises may not be enforceable through specific performance because the thrift agencies could not bind Congress, does not mean that respondents are not entitled to damages for the government's breach of its commitment.

Although the United States would have the Court believe otherwise, it is not an uncommon practice for government contracts to contain "provisions shifting financial responsibility to the government for events which might occur in the future." *Hughes Communications Galaxy, Inc.* v. *United States*, 998 F.2d 953, 959 (Fed. Cir. 1993). The government may assume the risk of economic loss from supervening events through either express or implicit arrangement. *Id.; D & L Construction Co. & Assocs.* v. *United States*, 402 F.2d 990, 999 (Ct. Cl. 1968). "It has long been established that while the United States cannot be held liable directly or indirectly for public acts which it performs as a sovereign, the Government can agree in a contract that if it does exercise a sovereign power, it will pay the other contracting party the amount by which its costs are increased by the Government's sovereign act." *D & L Construction*, 402 F.2d at 999; *see, e.g., Gerhardt F. Meyne Co.* v. *United States*, 76 F. Supp. 811, 815 (Ct. Cl. 1948) (a government agency "cannot enter into a binding agreement that it will not exercise a sovereign power, but it can say, if it does, it will pay you the amount by which your costs are increased thereby"); *Security Fed. Sav. & Loan Ass'n of Albuquerque* v. *FSLIC*, 796 F. Supp. 1435, 1447 (D.N.M. 1991) (although the government "'cannot enter into a binding agreement that it will not exercise a sovereign power, . . . it can say, if it does, it will pay . . . the amount by which . . . costs are increased thereby'"), *aff'd sub. nom Resolution Trust Corp.* v. *FSLIC*, 25 F.3d 1493 (10th Cir. 1994); *accord Wah Chang Corp.* v. *United States*, 282 F.2d 728, 735 (Ct. Cl. 1960), quoting *Gerhart F. Meyne Co.*, 76 F.Supp. at 815. In other words, the United States can by contract agree to pay damages for the exercise of its sovereign power.[10]

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[10]In these circumstances, the so-called sovereign acts

The United States argues, however, that no respondent has a contract that "unmistakably grant[s] . . . the right . . . to continue to count goodwill as capital for purposes of meeting federal capital requirements." Pet. Br. at 22. In other words, the government would have the Court conclude that it is not clear from the contracts at issue that the thrift regulators agreed that respondents would be compensated if subsequent legislation prevented the government from fulfilling its promises regarding supervisory goodwill. The United States is wrong.

The government begins by pointing out that the 1988 Assistance Agreement between the FSLIC and the Statesman plaintiffs does not explicitly mention supervisory goodwill. Pet. Br. at 32. But as the United States must concede, the Statesman Assistance Agreement contains a clause expressly incorporating as part of the contract the contemporaneously issued FHLBB Resolution. *Id.* That Resolution, in turn, provides that Statesman may amortize supervisory goodwill up to twenty-five years, and may treat the amortized amount as an asset for all regulatory purposes, notwithstanding later changes in FHLBB regulations. In short, the cross reference in the Assistance Agreement to the FHLBB Resolution establishes that the

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doctrine -- which shields the United States from liability for contract damages if legislation of general and public applicability renders its performance impossible, *see Horowitz* v. *United States*, 267 U.S. 458, 461 (1925) -- is beside the point as the government has, as a contracting party, agreed to be liable for damages if it cannot perform its contractual promises due to intervening legislation. *See Security Fed. Savings and Loan Ass'n of Albuquerque*, 796 F. Supp. at 1447; *see also D&L Construction*, 402 F.2d at 999.

two documents are an integrated whole and are not to be read in isolation as the government maintains.[11]

The thrift parties were fully cognizant of possible changes in the regulatory regime, and bargained for and

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[11]The United States also contends that even if the FHLBB Resolution is part of the contract, the Statesman plaintiffs had no vested right to continue to count supervisory goodwill as part of regulatory capital because of the clause in the Assistance Agreement precluding "unlawful action or inaction of the parties." Pet. Br. at 35. The United States offers no evidence that the parties understood this general boilerplate clause as overriding the specific provision in the integrated contract regarding supervisory goodwill, and such a reading is strongly disfavored by traditional rules of contract interpretation. *See, e.g., Hills Materials Co.* v. *Rice*, 982 F.2d 514, 517 (Fed. Cir. 1992) ("Where specific and general terms in a contract are in conflict, those which relate to a particular matter control over the more general language"). In this regard, the Accounting Principles Section of the Statesman Assistance Agreement specifically provides that the accounting treatment to be accorded supervisory goodwill as set forth in the agreement controls if in conflict with subsequent regulatory changes. *See infra* page 22. Since the specific language controls over the general, *see Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992), the language of the Accounting Principles Section trumps the more general language cited by the government. *See Fourco Glass Co.* v. *Transmirra Products Corp.*, 353 U.S. 222, 228 (1957) ("[T]he law is settled that '[h]owever inclusive may be the general language of a statute, it "will not be held to apply to a matter specifically dealt with in another part of the same enactment"'.")

But even if the clause is interpreted to apply to the contract as a whole, it would at most only preclude the remedy of specific performance. While FIRREA may make it unlawful specifically to enforce the supervisory goodwill promises made, the statute certainly does not make it unlawful for the government to pay damages.

obtained contract language guaranteeing their ability to use supervisory goodwill for regulatory capital purposes for a specified period even if doing so would be in conflict with later accounting regulatory standards. The "Accounting Principles" clause of the Statesman Acquisition Agreement begins by stating that "any computations made for the purposes of this Agreement shall be governed by GAAP," which recognized goodwill as an asset, "except where such principles conflict with the terms of the Agreement, applicable regulations in the [FHLBB] or the [FSLIC], or any resolution or action in the [FHLBB] approving or relating to the Acquisition, the Mergers or to this Agreement, then this Agreement, such regulations, or such resolution or action shall govern." J.A. 402. Having thus assured the primacy of the Agreement over any conflicting GAAP principles, the parties went on to make the accounting provided for in the Resolution -- authorizing Statesman to amortize the supervisory goodwill produced by the acquisitions over twenty-five years (J.A. 458-59) -- paramount over any conflicting regulations, whether then in effect or later adopted.

> If there is a conflict between such regulation and the [FHLBB's] resolution or action relating to the Acquisition, the Mergers or this Agreement, *the [FHLBB's] resolution or action shall control*. For purposes of this section, the accounting principles and governing regulations shall be those in effect on the Effective Date, as subsequently changed, amended, clarified by the [FHLBB] . . .[12]

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[12]Curiously, the United States draws the contrary conclusion (Pet. Br. at 31) by focusing on the second sentence of the quote to the total exclusion of the first sentence which makes it clear that the Resolution controls over conflicting regulations.

J.A. 403 (emphasis added) In short, as bargained for by Statesman, the accounting treatment for supervisory goodwill authorized by the Resolution controls over both conflicting GAAP accounting principles and FHLBB regulations either in effect at the time the Agreement was executed or as changed subsequently.

In some cases the government has argued that the acquiring thrift assumed the risk of a change in regulatory standards, citing explicit contractual provisions that it claims make clear that the supervisory goodwill arrangements in those agreements were subject to changed regulatory standards. *E.g., Guaranty Financial Services, Inc.* v. *Ryan*, 928 F.2d 994, 999 (11th Cir. 1991) (contract stated that "subsequent amendments to such regulations may be made and that such amendments may increase or decrease the Acquiror's obligation under this Agreement"). Even assuming that the government's reading of the scope of the reservation is correct, the contract language in *Guaranty* is in stark contrast to the language in the Accounting Principles section of the Statesman contract in which the provisions of the agreement *are expressly made to control over subsequent regulatory changes*.

If, as the United States argues, the language in the Statesman contract does not meet the "unmistakability test," then no language could ever suffice. In other words, the government effectively is proposing a rule of law that it can never be found liable for damages (or even for restitution or just compensation) notwithstanding contractual language that places the risk of subsequent legislation squarely on the government. There is simply no support for the notion that

all economic loss should be borne by respondents in these circumstances.[13]

The United States' position that respondents somehow accepted that risk simply denies the economic realities. According to the government, Pet. Br. at 27, "transactions of this sort offered a number of immediate benefits to the acquiring thrifts that would justify taking just such a risk." *See also* Pet. Br. at n.20. It would, however, have made no sense for Dollar or any of the respondents to accept without recourse the risk of the government's non-performance of its contractual obligations, and thereby allow the government to leave with them the losses that

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[13]The United States now suggests that supervisory goodwill was one of the "capital gimmicks that 'masked the inadequate capitalization of thrifts'," or that it is a "shadowy concept," "valueless" and "no good," and that it "means. . . that the taxpayer ultimately picks up the tab for the shortfall" when the government liquidates a failed thrift. Pet. Br. at 4-5. But as the above quotation from former FHLBB Chairman Richard Pratt illustrates, *see supra* page 5, the federal thrift regulators regarded supervisory goodwill as an "indispensable tool" that minimized the exposure of the FSLIC insurance fund and shifted those losses to the acquiring institution.

Moreover, contrary to what it now maintains, the government profited substantially through its aggressive use of that "gimmick." Although some acquiring thrifts were unable to survive once the government disallowed the promised use of supervisory goodwill in calculating regulatory capital, others -- like Dollar -- were able to meet FIRREA's new regulatory capital standards even without counting supervisory goodwill. As a consequence, the FSLIC insurance fund was never tapped for the costs of paying off the depositors and liquidating the thrifts acquired by institutions like Dollar. In fact, in Dollar's case alone, the government saved about $155,000,000, the difference between Contential's estimated net liabilities ($230,000,000) and the cash ($75,000,000) that the FHLBB agree to provide Dollar under the Assistance Agreement.

would otherwise be posted to the FSLIC deposit insurance fund. While the acquiring thrifts undeniably viewed the transaction as providing potential benefits, the government's theory would permit the thrift regulators to change the supervisory goodwill rules the day after the transaction was completed and well before the thrifts could realize any benefit from the acquisition.

It is simply not reasonable to believe that the respondents or other acquiring thrifts like Dollar would accept the burden of the losses of the insolvent thrifts, and leave the government with a right to nullify any potential benefit from the acquisition without also securing a right to seek damages if Congress enacted legislation preventing the thrift regulators from honoring their promises. *See Appleby v. Delaney*, 271 U.S. 403, 413 (1926). It must be remembered that it was the federal thrift regulators who were anxious to conclude the transactions. Consequently, acquiring thrifts like Dollar and the respondents were able to negotiate binding commitments that left the risk of a later change in regulatory approach with the government.

When all is said and done, the government's plea in these cases is for the Court to permit it to retain the substantial benefits it received from the respondents and other acquiring thrifts, like Dollar, without requiring that it perform the promises it made or to pay the losses sustained as a result of its failure to perform. There is no justice in that solution. "[O]rdinary principles of equity and justice preclude the United States from retaining . . . benefits and at the same time refusing to pay for them on the ground that the contracting officer's promise was unauthorized or unenforceable for some. . . reason." *Prestex Inc.* v. *United States*, 320 F.2d 367, 373 (Ct. Cl. 1963).

CONCLUSION

The judgment of the Federal Circuit should be affirmed.

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Respectfully submitted,

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